IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION (MAIN) NO. 349 OF 2006

AND

CRIMINAL MISC. APPLICATION (MAIN) NO. 350 OF 2006

Shri Basavraj D. Allayyanavar,
major, married, businessman,
r/o. Shapur, Ponda, Goa. ..... Applicant/Petitioner

V e r s u s

Shri Santosh Kapadi,
major, married,
r/o. Varkhandem, Ponda, Goa. ..... Respondent

Mr. Vishnu Naik, Advocate for the Applicant.

Mr. Valmiki Menezes, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 11th January, 2007.

ORAL JUDGMENT

Admit. By consent, heard forthwith.

2. These petitions filed under Section 482 of the Code (Code of Criminal Procedure, 1973), can be conveniently disposed of by this common Judgment.

3. The petitions have been filed by the Complainant who had

prosecuted the accused (Respondent herein), under Section 138 of the Negotiable Instruments Act, 1881, for bouncing of two cheques, in two cases. In one case, the cheque involved was for Rs. 25,500/- and in the other case the cheque involved was for Rs.30,000/-. In both the cases, the accused came to be convicted and sentenced by Judgments dated 31.01.2003. In each of the cases, the accused came to be sentenced to pay a fine of Rs.2,500/- and in default to suffer RI for two months. Out of the fine amount of Rs.2,500/-, Rs.2,000/- were ordered to be paid to the Complainant. The accused did not challenge the said conviction/sentence but the Complainant did by filing revision petitions before the Court of Sessions, and, the learned Additional Sessions Judge, Panaji, who disposed of the said revision petitions by Judgments dated 10.07.2006, referred to the case of ***Suganthi S. Kumar v. Jagdeeshan (AIR 2002 S.C. 681)***, and noted that that was a case where the cheque amount involved was Rs.4,50,000/-, for which the learned Magistrate had awarded imprisonment till the rising of the Court and fine of Rs.5,000/- and that, in that background, the Hon'ble Supreme Court had found that it was a flea bite sentence. The learned Additional Sessions Judge also noted that the Magistrate in these cases, had directed that from the fine imposed, a sum of Rs.2,000/- were to be paid to the Complainant by way of compensation and therefore the sentence/s imposed could not be termed as flea bite.

4. The cheque for Rs.25,500/- was dated 20.05.1997 and the cheque for Rs.30,000/- was dated 15.05.1997. At the relevant time, the offence under

Section 138 of the said Act was punishable with imprisonment for a term which could extend to one year or with fine which could extend to twice the amount of the cheque or with both. The imprisonment provided was subsequently increased to two years with effect from 06.02.2003.

5. On behalf of the Complainant, learned Advocate submits that whilst imposing the sentence, the learned Magistrate ought to have ensured that the Complainant was compensated at least to the extent of ensuring that the Complainant got the amount of the cheque. Learned Advocate further submits that the cheques were issued in May 1997 and the conviction came to be recorded six years later and yet the Complainant has been deprived of receiving the amount due on the cheques issued by the accused. Learned Advocate further submits that the learned Magistrate has not at all disclosed any reasons to show leniency in favour of the accused by imposing insignificant sentence/s by way of fine.

6. On the other hand, learned Advocate on behalf of the accused, submits that the revisions filed by the Complainant before the Court of Sessions were only against the inadequacy of sentence imposed and not against compensation being not ordered to be paid. Learned Advocate further submits that prosecution under Section 138 of the said Act is not a mode of recovery of the amount due to the Complainant and in case the amount of the cheque is required to be recovered, the Complainant can always file a Civil Suit. Learned Advocate further submits that in case this Court finds that the sentence imposed

requires to be interfered with, then it would be proper that the cases are remanded back to the learned Magistrate to hear both the parties and pass appropriate sentence as was done by the Apex Court in the case of ***Suganthi Suresh Kumar*** (supra).

7. The object behind introduction of Chapter XVII in the Negotiable Instruments Act, 1881, by virtue of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, is now well known. The said provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument, and subsequently, when the punishment provided was found to be deficient, the same was increased from one year to two years. The punishment provided namely that the offence was made punishable with imprisonment or with fine, which could extend to twice the amount of the cheque clearly shows the intention of the Legislature that the amount could be recovered by way of imposing a fine, which could extend twice the amount of the cheque, but that the Legislature did not carry out necessary changes in Section 29 of the Code of Criminal Procedure, 1973, is a different matter. The Apex Court in ***Hari Singh v. Sukhbir Singh & Ors. ((1988) 4 S.C.C. 551)***, referring to Section 397(3) of the Code, held that the quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending

upon the acts of each accused and reasonable period for payment of compensation, if necessary by instalments, may also be given. The Supreme Court also observed that the Court may enforce the order by imposing sentence in default. In other words, the Supreme Court reminded all concerned in the aforesaid decision that it was well to remember the emphasis laid down for making liberal use of Section 357 (3) of the Code.

8. In ***K. Bhaskaran v. Sankaran Vaidhyan Balan & anr. ((1999) 7 S.C.C. 510),*** the Supreme Court observed that if a Judicial Magistrate of the First Class were to order compensation to be paid to the Complainant from out of the fine realised, the Complainant will be the loser when the cheque amount exceeded the said limit. In such a case a Complainant would get only the maximum amount of Rs.5,000/- but the Magistrate in such cases can alleviate the grievance of the Complainant by making resort to Section 357 (3) Cr.P.C. The Supreme Court emphasized the need for making liberal use of that provision. No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course, while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the Complainant. Thus, even if the trial was before the Court of the Magistrate of the First Class in respect of a cheque which covers an amount of Rs.5,000/-, the Court has power to award compensation to be paid to the Complainant.

9. In ***Suganthi Suresh Kumar*** (supra), the Apex Court again observed that if the amount had been paid to the Complainant, there perhaps would have been justification by imposing a flea bite sentence as had been chosen by the trial Court in that case but in a case where the amount covered by the cheque remained unpaid, it should be the look out of the trial Magistrates that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case.

10. In the case at hand, though the cheques were issued by the accused in May 1997, and the cases ended on 31.01.2003, the amount due on the said cheques has remained unpaid and the accused must have certainly had had the last laugh by paying the meagre fine imposed by the learned Magistrate i.e. Rs.2,500/- in each case. It is obvious that both the Courts below have disregarded the law laid down by the Apex Court in the cases cited hereinabove. Sentencing discretion has been perverse. Since Section 138 of the said Act provides for imprisonment or fine which may extend to twice the amount of the cheque or both, the least both the Courts below ought to have done whilst imposing sentence is to ensure that the Complainant was compensated at least with the amount due by the accused on the cheque issued by him to the

Complainant. That should be the rule unless there are good reasons to depart from the same. The learned Magistrate as well as learned Additional Sessions Judge, have given no reason why this course was not adopted or why a lenient sentence was imposed, as rightly contended on behalf of the Complainant. On the face of the punishment provided, the accused was let off with a meagre sentence which certainly could be termed to be a flea bite sentence. Though no formula of a full proof nature is possible to be laid down in awarding appropriate sentences they should be proportionate to the crime committed and the same should be awarded by taking into consideration the facts and circumstances of each case. It is not only the rights of the criminals which are required to be looked into at the time of imposition of sentence, but also of the victims of the crime and the Society at large, also by considering the object sought to be achieved by the particular legislation. Sentence to be imposed should also have a deterrent effect. As George Saville would say *'men are not hanged for stealing horses but that horses may not be stolen.'*

11. Consequently, the order imposing the sentence against the accused deserves to be set aside and the case remitted to the learned Magistrate to pass appropriate sentence in accordance with law after hearing the Complainant as well as the accused.

12. As a result, the petitions are allowed. The impugned orders of both the Courts below are hereby set aside and the learned Magistrate is directed to

hear both the parties on the point of sentence and pass appropriate sentence in accordance with law. Both the parties are directed to remain present before the learned Magistrate on 22nd instant at 10.00 a.m. and the learned Magistrate is directed to dispose of the proceedings within 15 days thereafter.

N. A. BRITTO, J.

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